Supreme Court, U.S.
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No. 10-617

IN THE

Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION OF CENTER FOR DEMOCRACY & TECHNOLOGY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 9, 2010

Motion for Leave to File Amicus Brief

Pursuant to Supreme Court Rule 37.2(b), the Center for Democracy & Technology (CDT) respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari filed by petitioner Scott Roberts. As required by Rule 37.2(a), CDT provided timely notice to counsel for Petitioner and Respondent of CDT's intent to file a brief. Petitioner consented; Respondent did not.

CDT is a non-profit public advocacy organization that promotes the public's interest in keeping the Internet open, innovative, and free. CDT works to develop practical solutions to difficult problems posed by the intersection of law and technology, as well as to build consensus among all parties invested in the Internet's future.

CDT has expertise in a range of Internet and technology policy issues, including free speech on the Internet, liability protection for online intermediaries, data privacy, digital copyright, online child safety, health privacy, government surveillance, and government openness. CDT comments on current and proposed legislation and regulations, convenes multi-stakeholder working groups, advances sound Internet policies in national and international forums, files *amicus* briefs in court cases, and represents clients in litigation. CDT staffers regularly testify in front of federal agencies, state legislatures, and both houses of the U.S. Congress, and have served on advisory committees convened by the Federal Communications Commission, the Transportation Security Administration, the National Counter-

terrorism Center, and the U.S. Departments of State, Commerce, and Health and Human Services.

This case presents an important issue of law that directly implicates the public's interest in a free and innovative Internet. An erroneous personal jurisdiction standard for intentional torts—such as the one adopted by the Ohio Supreme Court—will severely restrict the free expression and economic growth fostered by the Internet by unfairly forcing Internet users to travel across the country to defend burdensome lawsuits. With years of experience developing practical solutions to legal challenges posed by technological change, CDT can provide important information about the need to clarify and properly develop personal jurisdiction rules for the Internet age.

Accordingly, CDT requests leave to file the accompanying brief, which asks the Court to grant certiorari and clarify the standards governing personal jurisdiction in cases presenting allegations of intentional torts.

Respectfully submitted,

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Interest of *Amicus Curiae*

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on keeping the Internet open, innovative, and free.[1] CDT has expertise on issues involving free speech on the Internet, liability protections for online intermediaries, data privacy, digital copyright, online child safety, government surveillance, and government openness.

This case presents an important issue of law that directly implicates CDT's areas of expertise and its role in advancing the public's interest in a free and innovative Internet. The Internet has given rise to a new era in which the majority of Americans can make their views available to a national audience, vastly increasing the importance of the Court's rules governing personal jurisdiction for intentional tort claims. An overly permissive personal jurisdiction standard for cases presenting allegations of intentional torts, such as the standard adopted in this case by the Ohio Supreme Court, harms online speech and inhibits the opportunities for innovative economic growth available online. As a source of and advocate for pragmatic approaches to novel problems posed by technological change, CDT can explain the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person other than CDT or its counsel made a monetary contribution to its preparation or submission. In accordance with Rule 37.2(a), CDT provided timely notice to counsel for Petitioner and Respondent of CDT's intent to file a brief. Petitioner consented to the filing; Respondent did not. A motion for leave to file accompanies this brief.

importance of clarifying and properly developing personal jurisdiction rules for the Internet age.

Introduction

As Petitioner explains, lower courts are divided on how to apply *Calder* v. *Jones*, 465 U.S. 783 (1984), to allegations of intentional torts based upon the defendant's Internet activity. *See* Pet. 10–16. Some courts have held that the defendant's knowledge of the plaintiff's state of residence does not alone suffice to establish personal jurisdiction consistent with the Due Process Clause, while others have held that mere knowledge is sufficient. Yet at the same time that the courts disagree about how to apply *Calder*, the answer is becoming increasingly important. The precise formulation of the standard for determining when online activity gives rise to personal jurisdiction in a plaintiff's home state will be critical to preserving the Internet as a vibrant forum for both speech and commerce.

First, the Internet has become a central forum for free expression in which a massive number of ordinary Americans reach nationwide audiences every day. An overly permissive interpretation of *Calder*, such as the one adopted by the Ohio Supreme Court, will stifle free speech online by subjecting millions of individual speakers to burdensome, often meritless lawsuits in distant jurisdictions.

Second, an overbroad personal jurisdiction standard for cases presenting allegations of intentional torts will also harm the increasingly Internet-driven American economy. Content created by individual Internet users—from product reviews and restaurant recommendations to blog posts and home videos—drives economic growth on the Internet. The largest,

most vibrant online businesses employ user-generated content as a crucial element of their business models. Thus, a personal jurisdiction standard that subjects the individual users who create this content to onerous litigation in distant forums will hamper online innovation and slow economic growth.

As the Court has previously recognized, standards of personal jurisdiction must reflect technological reality. Accordingly, the Court should grant the petition for a writ of certiorari and clarify the standard governing personal jurisdiction in intentional tort cases.

Reasons for Granting the Petition

I. The Threat Of Litigation Against Internet Users In Distant Jurisdictions Will Stifle Internet Speech.

Overly permissive rules of personal jurisdiction—adopted by the Ohio Supreme Court and others—could have a profound effect on the speech of millions of Internet users.

When the Court decided *Calder* in 1984, only a modest number of sophisticated broadcasters and journalists, with ample access to both capital and counsel, could publish information nationwide. *See generally Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247–54 (1974); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 29–30 (2006). It was natural for the Court in *Calder* to presume that the "effects test"—which premised personal jurisdiction on foreseeable effects in the plaintiff's jurisdiction—would apply to a relatively small number of sophisticated businesses and individuals who interacted with the

forum State. Indeed, the defendants in *Calder* were a professional reporter and a senior editor who worked for a prominent publication, *The National Enquirer*, whose controversial stories regularly sparked litigation. *See, e.g.*, William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press — An Extended Comment on "The Anderson Solution,"* 25 Wm. & Mary L. Rev. 793, 794 (1984). The *Enquirer*'s weekly circulation, which exceeded 5 million, included more than 600,000 copies to the forum State—twice as many as in any other State; the defendant reporter "frequently travel[ed]" to the forum State in his professional capacity and, for the story at issue, made multiple "phone calls to sources in [the forum State]." *Calder*, 465 U.S. at 785–86.

But by 2010, the Internet has turned widespread publication from the privilege of the few to the province of the many. Today, nearly four out of five Americans use the Internet, which permits anyone with a computer and Internet connection to make text, images, audio, and video available to others instantaneously and without regard to State boundaries. See Trend Data, Pew Internet & American Life Project, http://www.pewinternet.org/Static-Pages/Trend-Data/Online-Activites-Total.aspx (last visited Dec. 2, 2010); The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (stating that there are 231 million Internet users in the United States).

Far from acting as mere passive recipients of news and information, average Americans now actively participate and regularly supply content of their own. Tens of millions of Americans engage in the following activities:

- *Commenting on products:* Nearly a third of American Internet users, or approximately 74 million people, report that they have posted comments about products online. *See* Online Product Research, Pew Internet & American Life Project, at 2 (2010), http://pewinternet.org/Reports/2010/Online-Product-Research.aspx (follow "Read Full Report" hyperlink).
- *Commenting on news groups or blogs:* Approximately 60 million Americans have posted comments to an online news group, website, blog, or photo site. *See* Trend Data, *supra*, at 3.
- *Creating their own journals or blogs:* Nearly fifteen percent of American Internet users, approximately 32 million individuals, have created their own online journals or blogs. *See id.*
- *Using social networking sites:* Nearly half of all Americans report using social networking sites, *see* Online Product Research, *supra*, where users publish online statements to be viewed by hundreds, thousands, or even more across the country, *see* Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 Harv. J.L. & Tech. 1, 13–15 (2007).
- *Uploading video:* Online content generation extends beyond text. For instance, every minute of every day, users upload an average of 35 hours of video to YouTube. YouTube.com, YouTube Fact Sheet, http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html (last visited Dec. 2, 2010).

As these examples illustrate, individual Americans now communicate on a massive scale. Political, social, and artistic discourse—in other words, free

speech—now happens across State lines more than ever before. Indeed, the Internet is "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen." *ACLU* v. *Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (Dalzell, J., concurring).

Perhaps the quintessential example of a website dependent on user-generated content is Wikipedia, a free online encyclopedia whose content is written and edited by its more than 13 million registered users, as well as by many more users who do not register. *See* Statistics, http://en.wikipedia.org/wiki/Special:Statistics (last visited Dec. 2, 2010). Since the site was created in 2001, its articles have received more than 429 million edits. *Id.* Each article is typically written by numerous individuals who make contributions of varying sizes. *See generally* Jonathan Zittrain, *The Future of the Internet—And How to Stop It* 127–48 (2008). In addition to being far more accessible than a traditional encyclopedia, studies have found that Wikipedia is just as accurate. *See* Jim Giles, *Internet Encyclopedias Go Head to Head*, Nature News, Dec. 14, 2005, http://www.nature.com/news/2005/051212/full/438900a.html. Wikipedia has also been cited in more than 400 judicial opinions. *See* Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. App. Prac. & Process 191, 191 n.2 (2010). Yet under the Ohio Supreme Court's interpretation of *Calder*, every author or editor of a Wikipedia article about a living person or a business could face litigation in the home jurisdiction of the article's subject.

In short, an overly permissive personal jurisdiction standard could stifle the twenty-first century's most vibrant forum for free expression. In addition to facing claims of defamation and intentional interfer-

ence with contracts and business relationships, Internet users who generate and post content may face suit for, among others, privacy torts or intellectual property infringement. The massive increase in the number and diversity of speakers who could face litigation in distant forums demands that the Court clarify *Calder*'s application to suits alleging intentional torts.

II. The Threat Of Litigation Against Internet Users In Distant Jurisdictions Will Stifle Internet Commerce.

The question presented in this case is also crucial to the increasingly Internet-driven American economy. Many online companies are primarily in the business of providing Internet forums for user-generated content; examples include Yelp.com, Citysearch.com, and Tripadvisor.com, where users post reviews of restaurants, hotels, retailers, professional services, and other businesses. Online companies that sell tangible products and services also provide forums for user-generated content; examples include Amazon.com, a retail website where thousands of individuals have posted product reviews, and Expedia.com, a website for booking travel which offers user-generated reviews of hotels, cruises, and other travel activities. These companies cannot succeed unless their forums thrive.

Americans also increasingly depend on the Internet in making their purchasing decisions, whether they buy online or elsewhere. In 2010, nearly 60 percent of adults reported using the Internet to research products and services. *See* Online Product Research, *supra*, at 2. On a typical day, more than one in five

adults search for product information online, an increase from fewer than one in ten in 2004. *See id.*

Even more importantly, online shoppers increasingly depend on user-generated content (in the form of customer reviews) to help them decide which products or services to buy. *See* E-Tailing Group and PowerReviews, 5 Social Shopping Trends (May 26, 2010), http://www.e-tailing.com/content/wp-content/uploads/2010/06/social_shopping_webinar.ppt (surveying over 1,000 consumers who shop online at least four times per year and spend $250 or more annually). User-generated product reviews are rated as the most important social media tool in influencing purchasing decisions. *See id.* at 22. Online consumers also rank user-generated reviews as the most important product research tool that online retailers can provide—more important than customer service information, buying guides, or expert opinions. *See id.* at 29.

Given consumer demand, online companies solicit both positive and negative product reviews from their users. For example, Amazon.com "encourage[s]" its customers to submit "favorable and unfavorable" reviews to facilitate "smart buying choices." Amazon.com General Review Creation Guidelines, http://www.amazon.com/gp/community-help/customer-reviews-guidelines (last visited Dec. 2, 2010). Similarly, Yelp.com, an online provider of customer reviews of businesses and services, solicits reviews that "offer a rich narrative, a wealth of detail, and a helpful tip or two for other consumers." Yelp.com, Content Guidelines, http://www.yelp.com/guidelines (click "Review Guidelines") (last visited Dec. 2, 2010).

As these statistics highlight, user-generated content is increasingly fueling online commerce. Inter-

net users, however, will be deterred from posting reviews and otherwise generating content if they can be haled into distant forums to litigate potentially frivolous claims.[2] And if users are deterred from generating such content, these websites will likely receive less traffic, produce fewer transactions, and ultimately generate less revenue.

The consequences of such a change could be dramatic. Online commerce increasingly drives the American economy. In 2010, more than half of Americans reported buying products such as books, music, toys, or clothing online, up from just over a third in 2000. *See* Online Product Research, *supra*, at 3. Similarly, more than half of Americans reported making travel reservations or purchasing travel services online in 2010, as opposed to less than a quarter who did so in 2000. *Id.* One recent study estimated that by 2014, online sales will account for nearly $250 billion, or 8% of total retail sales in the United States. *See US Web Retail Sales to Reach $249 Billion By '14—Study*, Reuters, Mar. 8, 2010, http://reut.rs/dKhfyg. For instance, in 2009, Amazon.com generated nearly $25 billion in operating revenue and realized a gross operating profit of nearly $6 billion; it currently boasts a market capitalization of nearly $80 billion. See Amazon.com Inc., MarketWatch, http://www.marketwatch.com/investing/stock/AMZN (click "Profile" and "Financials" tabs) (last visited Dec. 2, 2010).

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[2] Although websites that host user-generated content are generally immune from claims of defamation based on statements made by users, *see* 47 U.S.C. § 230, litigation against users will inevitably undermine the viability of sites that depend on user-generated content.

In previous cases, the Court has not hesitated to adapt personal jurisdiction doctrine to technological change affecting large parts of the American economy. For instance, in the middle of the twentieth century, the automobile rendered obsolete the physical-presence conception of personal jurisdiction embodied by *Pennoyer v. Neff*, 95 U.S. 714 (1877). As a result, the Court adapted the doctrine to reflect the more flexible standards set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 316–19 (1945). *See Shaffer v. Heitner*, 433 U.S. 186, 202–03 (1977) (explaining how the growth of the automobile induced changes to *Pennoyer*). Today, major technological and commercial changes again warrant the Court's review.

Conclusion

The petition for a writ of certiorari should be granted.

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